88-892

No. _____

Supreme Court, U.S.
FILED
NOV 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR KINOY,

Petitioner,

—v.—

~~JOHN M. MITCHELL, individually and as former Attorney General of the United States;~~ CLYDE A TOLSON, as executor of the Estate of J. Edgar Hoover; WHITNEY NORTH SEYMOUR, individually and as former United States Attorney for the Southern District of New York; "JOHN DOE," individually and as an agent of the Federal Bureau of Investigation; "RICHARD ROE," individually and as an agent of the Federal Bureau of Investigation; and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Arthur Kinoy petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered in this proceeding on July 1, 1988.

QUESTIONS PRESENTED

1) Whether an attorney whose confidential communications with his clients have been subjected to unlawful electronic surveillance by the United States Government in violation of the Sixth Amendment rights of his clients may assert the violation of his own constitutional rights under the Fifth Amendment as the result of such surveillance?

2) Whether an attorney who has standing to assert the violation of his clients' Sixth Amendment rights as the basis for seeking injunctive and

declaratory relief may also assert such rights as the basis for seeking compensation for the injury he has thereby suffered?

PARTIES TO THE PROCEEDINGS

Petitioner Arthur Kinoy, the appellee in the Court of Appeals and the remaining plaintiff in this action, is a licensed attorney-at-law. The appellants in the Court of Appeals and remaining defendants are Clyde A. Tolson, as executor of the Estate of J. Edgar Hoover; Whitney North Seymour, sued individually and as former United States Attorney for the Southern District of New York; and "John Doe" and "Richard Roe," sued individually and as agents of the Federal Bureau of Investigation.[1]

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[1] John N. Mitchell, sued individually and as former Attorney General of the United, and recently deceased, was not a party to the appeal. The United States was dismissed as a party defendant by stipulation. See p.2, n.3, infra.

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OPINIONS BELOW

The Court of Appeals for the Second Circuit issued a decision on July 1, 1988 reversing a judgment of the U.S. District Court for the Southern District of New York which denied defendants' motion for summary judgment. A copy of its opinion, as yet unreported, is annexed as Appendix A. A copy of the District Court's Memorandum and Order of March 26, 1987 denying defendants' motion for reargument of their summary judgment motion, also unreported, is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1988. On September 22, 1988 Justice Marshall signed an order extending the time to

file a petition for certiorari to and including November 28, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS

United States Constitution,

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution,

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

Petitioner Arthur Kinoy is a noted lawyer and professor of constitutional law who has distinguished himself as an advocate of civil rights and civil liberties and as a criminal defense attorney. He has served as counsel of record in a number of landmark cases in this Court[2] and in at least 150 other reported cases. In his career as a "people's lawyer" he has frequently been an adversary of the federal government in criminal as well as civil litigation.

Kinoy's confidential conversations with his clients have been subjected to two lengthy episodes of warrantless electronic surveillance by the federal

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[2] These include Dombrowski v. Pfister, 380 U.S. 479 (1965), Dombrowski v. Eastland, 387 U.S. 82 (1967), Powell v.McCormack, 395 U.S. 486 (1969), and United States v. United States District Court, 407 U.S. 297 (1972) ("Keith").

government. The first began in 1948, while he was employed as Assistant General Counsel in the national office of the United Electrical, Radio and Machine Workers of America and continued throughout the McCarthy era until the mid-1950's, when he had left the union and established a private practice. The second began in the late 1960's, the time of the Vietnam War protests, and continued into the early 1970's.[3] The Attorney General maintained that he ordered this wholesale eavesdropping on the view, now discredited, that the Executive had inherent power to eavesdrop on any person or organization it deemed a threat to national security. For seventeen years the government has

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[3] It is ironic that at the very time Kinoy was preparing to argue Keith before this Court, the government was still engaged in an all-out invasion of his confidential communications with his clients.

resisted providing all the interceptions it has. Despite court orders it still withholds more than 1,000 logs (each containing numerous conversations) of these intercepts, which it calls "incidental overhears." Kinoy seeks damages for this massive violation of the Fifth and Sixth Amendment rights guaranteed by the Constitution to himself and his clients.

This action was commenced in 1971 by Kinoy and his daughter Joanne[4] by order to show cause to quash a subpoena

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[4] Joanne Kinoy was dismissed as a plaintiff as part of a stipulation of settlement, approved by the District Court on December 28, 1987, in which the United States was dismissed as a defendant and plaintiffs' claims for injunctive and declaratory relief were dismissed, all with prejudice, on the basis of representations by defendants that there was not currently any unlawful surveillance of Arthur or Joanne Kinoy and a promise by the United States Government that it would not undertake any electronic surveillance of Arthur or Joanne Kinoy in the future except pursuant to lawful authority and the mandate of the Constitution.

compelling their testimony before a grand jury. In re Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971). In 1972 the complaint was amended to assert a claim for damages for electronic surveillance in violation of the First, Fourth, Fifth, Sixth, and Ninth Amendments. The intervening years have been largely occupied in combating the government's stubborn resistance to discovery, including disputes over claims of privilege that took years to resolve. On May 8, 1986 defendants moved for summary judgment on the ground, inter alia, that the complaint failed to state a valid constitutional claim. At a hearing on February 4, 1987 the District Court dismissed the claims based on Fourth Amendment violations, finding that defendants were entitled to qualified immunity pursuant to Mitchell v. Forsyth, 472 U.S. 511 (1985). But it refused to rule that defendants were also entitled

to qualified immunity for their alleged violations of the Fifth and Sixth Amendments. The court noted that the extensive wiretapping of attorney-client conversations created a "presumption of use" and denied summary judgment "without prejudice to renewal following the completion of reasonable discovery on the issue of what use the Government may have made of the interceptions of plaintiffs' telephone conversations." Memorandum Endorsement and Order, February 6, 1987.

Defendants promptly noticed an appeal as of right from the denial of qualified immunity and also moved for reargument or, in the alternative, for certification of the summary judgment order and a stay of discovery pending appeal. In its Memorandum and Order of March 26, 1987, (App. B) the District Court denied reargument but granted the motions for certification and stay of

discovery. The court commented that the application of Mitchell v. Forsyth to Fifth and Sixth claims was one of first impression and that this case was likely to have "significant precedential value." Id. at A13. On the issue of standing, the court found it clear that Kinoy could maintain this action on his own behalf and on behalf of clients whose conversations were overheard. Id. at A 11-12.

In its decision of July 1, 1988, reversing the District Court's denial of summary judgment and remanding for the entry of judgment dismissing the complaint (App. A), the Court of Appeals did not find it necessary to reach the question of qualified immunity (Id. at A6), the only issue as to which defendants were entitled to an interlocutory appeal as of right, but simply held that "under the Fifth and

Sixth Amendments there is not and never has been a recognized constitutional right of an attorney, as distinguished from any right of his client, to communicate with the client free from government intrusion when national security interests are implicated, . . . " Id. at A8. As to any claim based on standing to assert his clients' rights, the court stated without discussion that Kinoy "seeks only damages" and thus his action "differs from those in which a plaintiff, basing his claim at least in part on the rights of another -- for example, a physician's patient or an attorney's client -- sought only declaratory and injunctive relief."

REASONS FOR GRANTING THE WRIT

Disdaining to decide or even discuss the issues presented to it for decision, the Court of Appeals, without pretense of analysis, has blithely announced a

startling constitutional proposition of enormous and fearsome scope: under no set of circumstances may an attorney assert his right to be free of unlawful intrusion by the government into his relationship with his clients. It matters not, under the court's rubric, how pervasive the intrusions, how clearly violative of the constitutional right to the effective assistance of counsel, or what injury has been inflicted on the attorney as well as on his client, the attorney has no redress. While the language of the court seems to limit its holding to cases "when national security interests are implicated," nothing in its cursory discussion reveals why it should be so limited.[5] This unprecedented

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[5] The claimed national security basis of the surveillance only has to do with the question whether the admitted warrantless electronic surveillance of Kinoy's communications with his clients was a clearly established violation of their Sixth Amendment rights at the time

restriction on the constitutional right of an attorney to preserve the sanctity of the attorney-client relationship surely calls for review by this Court. It is in direct conflict with the decision of the United States Court of Appeals for the Eighth Circuit in Wounded Knee Legal Defense/Offense Committee v. FBI, 507 F.2d 1281 (8th Cir. 1974), relied on by the District Court, and departs from principles set forth in the decisions of this Court that have accorded standing to physicians to bring suit to vindicate the constitutional rights of their patients.

Equally novel and far-reaching in its implications is the dismissal of Kinoy's claims on the ground that he seeks "only" damages. The inescapable

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it occurred. That is, it is pertinent only to the issue of qualified immunity which the court never addressed, not to the issue of Kinoy's right to assert a claim growing out of a violation.

inference is that standing to seek relief from prospective violations of the constitutional rights of third parties does not encompass any concomitant remedy in damages for past violations. The court below has cited no case to support such an extraordinary theory, which runs counter to the principles on which this Court grants standing and is again in direct conflict with the decision of the Eighth Circuit in Wounded Knee.

Kinoy's Constitutional Right To Practice Law

The due process guaranteed by the Fifth Amendment includes the right of the individual "to engage in any of the common occupations of life" without arbitrary interference by the government. Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (reversing the conviction of a school teacher for teaching German to a grade-school child). A lawyer surely has a Fifth Amendment right to practice his

profession without unlawful governmental intrusion into the attorney-client relationship which is the profession's very foundation. In Singleton v. Wulff, 428 U.S. 106 (1976), this Court held that physicians whose practice included the performance of abortions had standing to challenge the constitutionality of a Missouri statute prohibiting medicaid reimbursement for abortions that are not "medically indicated." While the Court divided on the question whether for prudential reasons the plaintiffs should be permitted to assert the constitutional rights of their patients to equal protection, all the Justices concurred that they had standing to assert their own constitutional rights to practice medicine. As put by Justice Stevens:

> In this case (1) the plaintiff-physicians have a financial stake in the outcome of the litigation, and (2 they claim that the statute impairs their own constitutional rights. They therefore clearly have

standing to bring this action. 428 U.S. at 121. Cf. Doe v. Bolton, 410 U.S. 179 (1973) (physicians granted standing to challenge Georgia statutes limiting abortions which they alleged chilled and deterred them from practicing their profession); Epperson v. Arkansas, 393 U.S. 97 (1968) (school teacher granted right to challenge Arkansas anti-evolution statute).

In Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974), cert. denied, 419 U.S. 891 (1974), doctors had attacked a resolution of a municipal hospital prohibiting the use of hospital facilities for the performing of any abortion not necessary to preserve the mother's life, claiming that it was an encroachment on their constitutionally guaranteed rights. Holding that they had standing to maintain the action, the court said unequivocally:

> We think that the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) has clearly paved the way for physicians to assert their constitutional rights to practice medicine, which now includes the right to advise and perform abortions. . . . Clearly the claims of medical doctors to 'freely practice medicine according to the highest medical standards without arbitrary outside restraints' are inextricably bound up with the privacy rights of women who seek abortions. [Citation omitted.]

495 F.2d at 1344.

The Nyberg holding as to the professional rights of doctors was extended a fortiori to the professional rights of lawyers in Wounded Knee, supra. The Wounded Knee Legal Defense/Offense Committee, which had been formed to provide free legal aid to the native Americans charged with the occupation of Wounded Knee, South Dakota, brought suit against the FBI charging that FBI agents had harassed and intimidated its members in violation of their Fourth Amendment

rights and the Sixth Amendment rights of their clients. In reviewing the denial of an application for a preliminary injunction, the court said:

> At issue in the merits of the case (not yet determined) is the right of members of the Committee to provide effective assistance of counsel to their Indian clients who wish to avail themselves of their Sixth Amendment rights.

507 F.2d at 1284. Quoting Nyberg, it continued:

> With even stronger force it may be said that a lawyer has standing to challenge any act which interferes with his professional obligation to his client . . . .

Ibid. See, also, Keker v. Procunier, 398 F. Supp. 756, 760-61 (E.D.Cal. 1975), in which the court stated that it could discern no reason why attorneys should not be afforded the same scope of constitutional protection as is afforded to physicians; that the right to practice a profession necessarily includes the right to practice according to the

highest standards of the profession, and that "the foundation of the legal practice is the right to maintain the privacy and freedom from intrusion essential to the attorney-client relationship."

Petitioner submits that the cases cited establish his independent constitutional right to practice law without hindrance from unlawful intrusion by federal or other governmental agencies into the privacy of his relationships with his clients, and that the holding of the court below is in direct conflict with those cases.

Kinoy's Standing To Assert
The Constitutional Claims Of His Clients

Separate from, though closely associated with, Kinoy's standing to assert the violation of his own constitutional right to practice law is his standing to vindicate the Sixth Amendment rights of his clients. The

court's opinion is not entirely free from ambiguity on this score. Its principal thesis is that Kinoy possessed (and possesses) no independent right to be free of governmental intrusion into his attorney-client relationships. Its "further" thesis is that Kinoy, having secured injunctive relief, is not entitled to damages, his action thereby "differing from those in which a plaintiff, basing his claim at least in part on the rights of another -- for example, a physician's patient or attorney's client -- sought only declaratory and injunctive relief." App. A at A8. The court then cites a string of "standing" cases, including several of those cited above. This would seem to imply recognition by the court that Kinoy had standing at least for some purposes to assert the violation of his clients'

rights.[6]

In any event, a number of the cases cited above establish not only that Kinoy may assert his own constitutional right to practice law without molestation, but also that he has standing to assert claims grounded on the violation of the constitutional rights of his clients.

In Singleton vs. Wulff, supra, the plurality held that the physicians, apart from standing to assert their own constitutional rights, had standing to assert the rights of their patients. They satisfied both the jurisdictional "injury in fact" test, having alleged a sufficiently concrete interest in the outcome of their suit to make it a justiciable controversy, and also the

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[6] That would seem to be implicit in the government's willingness to stipulate to an injunction. For if Kinoy clearly had no standing, there would have been no reason whatever why it should have subjected itself to such a restraint.

"prudential" test, having a relationship with the patient that made them fully, or very nearly, as effective a proponent of the patient's rights as the latter, and there being genuine, even though not insurmountable, obstacles to the assertion of such rights by the patient. 428 U.S. at 112-118.[7] Applying these considerations to lawyers in Wounded Knee, supra, the Eighth Circuit held that a lawyer has standing to challenge any act which interferes with his professional obligation to his client

> and thereby, through the lawyer, invades the client's constitutional right to counsel. It requires no citation of authorities to reaffirm our historic commitment to effective assistance of counsel in criminal cases.

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[7] Justice Stevens concurred in the plurality's view that the physicians had a basis for arguing the constitutional rights of their patients only on the ground that they clearly had standing to bring the action to vindicate their own rights. Id. at 121-122. This analysis would, of course, accord standing to Kinoy in this action.

507 F.2d at 1284. Cf. In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 606, n.10 (App.D.C. 1976); Aiken v. Obledo. 442 F.Supp. 628, 644-45 (E.D.Cal. 1977) (legal services organization has standing to challenge administrative policy that impaired its ability to represent its clients).

The District Court in this case found it clear that Kinoy had standing to maintain this action on behalf of clients whose conversations were overheard, as well as on his own behalf. App. B at 11-12. This issue was among those certified for appeal and argued by defendants on their appeal, but it was not addressed by the Court of Appeals except insofar as it held that Kinoy does not have standing to seek damages. Hence it would appear that the District Court's holding as to Kinoy's standing to assert the rights of his clients remains undisturbed in all

other respects.

Kinoy's Standing
To Seek A Remedy In Damages

The Court of Appeals has provided neither precedent nor reasoning for its distinction between standing to obtain injunctive relief and standing to obtain damages. Indeed, in two of the cases cited by the court as instances where only declaratory and injunctive relief was sought, the attorney plaintiffs did seek damages: Wounded Knee and Keker v. Procunier. In the former case, in holding that jurisdiction existed to grant injunctive relief, the court relied in part on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), stating that, while in Bivens the plaintiffs sought monetary damages against federal agents, "the role of the courts in protecting constitutional rights by injunctive relief is the same." 507 F.2d at 1284.

And in Keker v. Procunier, although the court took no position on the question whether both damages and injunctive relief might be available on the Sixth Amendment claims in as much as the parties had not raised the issue, it found no difficulty in refusing to dismiss a claim for punitive damages. 398 F. Supp. at 765-66, 768.

There can hardly be a question of "injury in fact" where the claim is for compensation for injuries received. If the court may act to prevent future harm, why may it not also redress the harm already done? As this Court said in Bell v. Hood, 327 U.S. 678, 684 (1946), upholding federal jurisdiction of a claim for damages against FBI agents for violations of the plaintiffs' constitutional rights and noting that it was established practice for this Court to sustain the jurisdiction of the

federal courts to issue injunctions to protect rights safeguarded by the Constitution:

> Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

In this case damages provide the only meaningful remedy "to make good the wrong done" to Kinoy and his clients by the years of secret government spying on the confidential communications between them. The injunctive relief which the court below appears to consider a sufficient and exclusive vindication of their rights has no more than a symbolic value. Electronic surveillance had already ceased by the time it came to light, or so the government represents. It cost the government nothing to

promise, after 15 years had gone by, that it will behave itself from now on. Damages alone can vindicate the violated rights. Kinoy is entitled to the opportunity to go forward with his case to show, as he has reason to believe he can, that the government's vast collection of intercepts was not an idle pastime but was employed to his detriment and that of his clients.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A A1

APPENDIX B A10

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 857, 859, 860—August Term 1987

Argued: March 15, 1988 Decided: July 1, 1988

Docket Nos. 87-6047, 87-6119, 87-6137

JOANNE and ARTHUR KINOY,

Plaintiffs-Appellees,

—against—

JOHN M. MITCHELL, individually and as former Attorney General of the United States; ELLIOT G. RICHARDSON, as Attorney General of the United States; CLYDE A. TOLSON, as executor of the Estate of J. Edgar Hoover; CLARENCE KELLEY, as Director of the Federal Bureau of Investigation; WHITNEY NORTH SEYMOUR, individually and as former United States Attorney for the Southern District of New York; JOHN H. DOYLE, individually and as former Assistant United States Attorney; "JOHN DOE," individually and as an agent of the Federal Bureau of Investigation; "RICHARD ROE," individually and as an agent of the Federal Bureau of Investigation; and the UNITED STATES OF AMERICA,

Defendants-Appellants.

Before:

PRATT and MINER, *Circuit Judges*,
and JOHN M. WALKER, *District Judge**

Appeal from an order of the United States District Court for the Southern District of New York, Robert J. Ward, *District Judge*, denying defendants' motion for summary judgment against plaintiff for plaintiff's failure to state a valid constitutional claim.

Reversed and remanded.

RUDOLPH W. GIULIANI, United States Attorney for the Southern District of New York (Randy M. Mastro, Steven E. Obus, of Counsel), *for Defendants-Appellants*.

HENRY F. FURST, Upper Montclair, New Jersey (Jeremiah Gutman, New York, New York, Michael Ratner, New York, New York, of Counsel), *for Plaintiff-Appellee*.

WALKER, *District Judge*:

Defendants-appellants John M. Mitchell, Clyde A. Tolson, Whitney North Seymour, John Doe and Richard

* Honorable John M. Walker, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Roe appeal from the February 4, 1987 order of the United States District Court, Southern District of New York, Ward, J., denying their motion for summary judgment against plaintiff Arthur Kinoy, an attorney. Kinoy seeks money damages for himself for the government's warrantless interceptions of his conversations with clients.[1]

On March 26, 1987, Judge Ward certified his order for purposes of interlocutory appeal, pursuant to 28 U.S.C. § 1292(b).

Appellants assert, *inter alia*, that summary judgment should have been granted in their favor for Kinoy's failure to state a valid constitutional claim. We agree with appellants and reverse.

Background

Kinoy, a noted civil rights attorney, brought this action nearly two decades ago, alleging that on many occasions between 1949 and 1970, his conversations with clients were electronically intercepted by the government without judicial authorization. The government denies Kinoy was ever the direct target of these admittedly warrantless national

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1 John Doyle, Elliot Richardson, Clarence Kelley, and Paul Curran were previously dismissed as defendants in this action.

Joanne Kinoy, Arthur Kinoy's daughter, was originally a plaintiff in this action. On December 28, 1987, all of Joanne Kinoy's claims against all of the defendants were dismissed with prejudice. *See* Joint Appendix [hereinafter cited as "JA"] at 395-398.

Joanne Kinoy had moved to certify a class consisting of "all those persons who consult and have consulted with plaintiff Arthur Kinoy as their attorney." Amended Complaint at ¶ 4; JA at 73. No class was ever certified and Judge Ward, at the February 4, 1987 hearing, indicated that no class would be certified. JA at 27.

security wiretaps,[2] and maintains that the wiretaps were authorized pursuant to "several national security investigations," which concerned both "foreign security" and "domestic security."[3]

In 1970 Kinoy brought this action, alleging the government's violation of a long list of his and his clients' constitutional rights. The parties then endured nine years of discovery, during which time the government made available to both Kinoy and Judge Ward telephone logs of the intercepted conversations.

The case lay dormant from 1979 until 1985. During that period, the Supreme Court decided *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which held that, for warrantless wiretaps prior to 1972, the Attorney General was entitled to qualified immunity in actions by persons alleging that such wiretaps violated their Fourth Amendment rights. The action was revived in 1985, after Kinoy's counsel responded, upon Judge Ward's inquiry, that Kinoy wished to pursue the action.[4] Despite the fact that Kinoy's Fourth Amendment claims were effectively gone from the case, Judge Ward allowed the action to go forward because Kinoy indicated he wished to pursue his claims on Fifth and Sixth Amendment grounds.

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2 The government characterizes the interceptions of Kinoy as "incidental." Brief of defendants-appellants at 6. At the February 4, 1987 hearing on Kinoy's motion to amend his complaint and defendants' cross-motion for summary judgment, Judge Ward stated that "[f]rom my review of the materials, it does strike me that [Kinoy] was not the subject of any interception but was intercepted incidentally." JA 23; *See also* JA 25-26.

3 JA at 16; Brief of defendants-appellants at 2.

4 At the February 4, 1987 hearing, Judge Ward stated, in response to the government's motion for dismissal for failure to prosecute, that "I think if I picked up and sua sponte entered an order just before I saw [Kinoy's counsel in 1985], that would have been appropriate." JA at 22.

Specifically, on February 4, 1987, Judge Ward held a hearing on Kinoy's motion to amend his complaint, previously amended in 1971, and defendants' cross-motion for summary judgment. At the hearing, Kinoy withdrew his motion to amend the complaint.[5]

Commenting on the motion for summary judgment, Judge Ward stated at the hearing that he thought "there is nothing left to this case," and that if he were required to write an opinion, there would be "a dismissal with sanctions under Rule 11. . . ."[6]

Despite his prediction of the outcome of Kinoy's action in the face of defendants' motion for summary judgment, Judge Ward denied the motion. At oral argument, Kinoy raised his concern for the first time that the government might have used the intercepts against his clients in some way, perhaps using foreknowledge of Kinoy's trial strategy to fashion the government's own trial strategy. Although Kinoy had not raised the issue in his pleading, and although, when questioned by Judge Ward, he admitted he had no evidence of any use of the intercepts by the government,[7] Kinoy argued that further discovery was necessary to settle the matter. On that basis, Judge Ward denied defendants' motion for summary judgment, allowing the parties a "reasonable period to compel whatever discovery was appropriate."[8]

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5 Judge Ward stated that "[i]t seems to me that the proposed amended complaint would be the basis for Rule 11 sanctions." *Id.* at 34.

6 *Id.* at 33. Judge Ward further stated that he could "spend considerable time . . . outlining the deficiencies in [Kinoy's] case. They are fatal deficiencies." *Id.* Judge Ward also told Kinoy that "for six different reasons, probably, you are out of court." *Id.* at 29.

7 *Id.* at 30.

8 *Id.* at 50.

Defendants now appeal from Judge Ward's denial of summary judgment.

Discussion

At the hearing before Judge Ward, defendants argued principally that they enjoyed qualified immunity against Kinoy's Fifth and Sixth Amendment claims. Plaintiffs relied upon *Mitchell v. Forsyth*, 472 U.S. at 530, in which the Supreme Court held that the Attorney General possessed qualified immunity against suit for a warrantless wiretap "aimed at gathering intelligence regarding a domestic threat to national security", because the unconstitutionality of the wiretap was not clearly established at the time the tap was authorized. Judge Ward disagreed with defendants, holding that "[w]ith respect to plaintiff's Fifth and Sixth Amendment claims, . . . defendants' actions [are not] covered by qualified immunity."[9] On this appeal, however, we do not need to reach this question.

At oral argument before this Court, Kinoy conceded that his sole remaining claim is one for damages for the alleged violations of his own rights as an attorney. He asserts that the warrantless interceptions of his conversations with clients violated his rights under the Fifth and Sixth Amendments to the Constitution.

Because we hold that under the Fifth and Sixth Amendments there is not and never has been a recognized constitutional right of an attorney, as distinguished from any right of his client, to communicate with the client free from government intrusion when national security interests are implicated, Kinoy has failed to state a valid constitutional claim, and his action must be dismissed.

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9 *Id.* at 65.

In 1971, the Supreme Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971), that a violation of a constitutional guarantee "by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." The following year, in *United States v. United States District Court*, 407 U.S. 297 (1972), the Supreme Court held that warrantless wiretaps violated the Fourth Amendment in cases involving domestic threats to national security.

A predicate for recovery under *Bivens*, of course, is that the plaintiff possess a constitutional right capable of violation. Kinoy argues that, as an attorney, he had a "clearly established" right, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), to be free from government intrusion into his conversations with clients. However, during the period of interception, 1949 through 1970, there was no constitutional guarantee that an attorney, independent of any right of his client, might communicate with the client without government interference when national security interests were at stake.

The starting point for any analysis of a constitutional provision is, of course, the text of the provision itself. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Thus, the Amendment, on its face, secures no right personal to the attorney.

In interpreting the Sixth Amendment, courts have not found a constitutional right of an attorney independent of any right of the client. In none of the cases upon which Kinoy relies was an attorney asserting his right to be free from government interference with client communications, without reference to the vindication of the client's

rights. Rather, in every case, either a criminal defendant was asserting a right to communicate confidentially with his attorney, or a court was concerned that interception of attorney-client conversations had deprived a convicted defendant of a fair trial. *See O'Brien v. United States*, 386 U.S. 345 (1967) (per curiam); *Schipani v. United States*, 385 U.S. 372 (1966) (per curiam); *Black v. United States*, 385 U.S. 26 (1966) (per curiam) (conviction reversed to ensure fair trial); *United States v. Rosner*, 485 F.2d 1213, 1223-24 (2d Cir. 1973) (defendant asserting rights), *cert. denied*, 417 U.S. 950 (1974); *United States v. Denno*, 221 F.2d 626 (2d Cir.) (defendants asserting rights), *cert. denied*, 349 U.S. 968 (1955); *Caldwell v. United States*, 205 F.2d 879, 881 (D.C. Cir. 1953) (defendant's rights at stake); *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952); *United States v. Orman*, 417 F. Supp. 1126 (D. Col. 1976).

Further, Kinoy seeks only damages, having already secured permanent injunctive relief against further unlawful governmental electronic surveillance of him.[10] Thus, this action differs from those in which a plaintiff, basing his claim at least in part on the rights of another—for example, a physician's patient or attorney's client—sought only declaratory and injunctive relief. *See Singleton v. Wulff*, 428 U.S. 106 (1976) (physician sought injunction against enforcement of abortion statute limiting his right to practice); *Doe v. Bolton*, 410 U.S. 179 (1973) (same); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (physician asserted patient's rights); *In re Investigation Before The April 1975 Grand Jury*, 531 F. 2d 600 (D.C. Cir. 1976) (per curiam) (attorney asserted his right to practice and clients' right to counsel); *Wounded Knee Legal Defense/Offense Committee v. FBI*, 507 F.2d 1281 (8th Cir. 1974) (attorney asserted

10 J.A. at 395-97; Reply brief of defendants-appellants at 2.

client's rights); *Keker v. Procunier*, 398 F. Supp. 756 (E.D. Cal. 1975); *See also Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

In sum, Kinoy has failed to state a valid Fifth or Sixth Amendment cause of action. Kinoy, as an attorney, possessed no constitutional right, independent of his clients' rights, to communicate with his clients without government intrusion when national security interests were at stake. Therefore, the denial of defendants' summary judgment motion against Kinoy was error.

The judgment of the District Court denying defendants' motion for summary judgment is reversed, and the case is remanded with a direction to enter judgment in favor of all defendants dismissing the complaint.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 CIV. 5698(RJW)

JOANNE KINOY and ARTHUR KINOY,

Plaintiffs,

—against—

JOHN M. MITCHELL, et al.,

Defendants.

MEMORANDUM AND ORDER

On February 4, 1987, this Court denied defendants' motion for summary judgment. In its order, the Court found that, pursuant to *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), plaintiffs' claims under the Fourth Amendment were barred by the doctrine of qualified immunity because it was not clearly established at the time of the wiretaps that warrantless domestic security wiretaps violated the Fourth Amendment. *See* Tr. at 19, 23-24, 28, 40-46. With respect to plaintiffs' Fifth and Sixth Amendment claims, however, the Court did not find defendants' actions to be covered by qualified immunity. Relying on *Mitchell* v. *Forsyth*, *supra*, 472 U.S. at 530, which holds that a district court's denial of a claim of qualified immunity is appealable, defendants appealed this Court's denial of immunity to the Second Circuit. *See* Notice of Appeal, dated March 6, 1987. Defendants now move pursuant to Rule 3(j) of the Civil Rules of this Court for reargument of the February 4, 1987 order denying defendants' summary judgment motion or in the alternative request certification of the order pursuant to 28 U.S.C. § 1292(b). Defendants also seek a stay of discovery pending resolution of defendants' motion for reconsideration and any subsequent appeal. For the reasons to follow, this

Court denies defendants' motion for reargument, grants defendants' request for certification, and stays discovery during the pendency of the appeal in the Second Circuit.

Motion for Reargument

The standard for granting a motion for reargument is strict in order to dissuade repetitive arguments on issues that have already been considered fully by the Court. *Caleb & Co.* v. *E.I. Dupont de Nemours & Co.*, 624 F. Supp. 747, 748 (S.D.N.Y. 1985). Such motions, therefore, may only be granted where the court "has overlooked 'matters or controlling decisions' which, had they been considered, might reasonably have altered the result reached by the court." *New York Guardian Mortgagee Corp.* v. *Cleland*, 473 F. Supp. 409, 420 (S.D.N.Y. 1979). In seeking reargument, defendants contend the Court overlooked four points:

1. that pleading deficiencies require dismissal of the complaint;
2. that Joanne and Arthur Kinoy lack standing;
3. that Arthur Kinoy has not been damaged; and
4. that the action should be dismissed in the light of *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978).

None of defendants' points satisfies the standard for granting a motion for reargument.

The Court has previously considered the sufficiency of the complaint, finding the complaint to be adequately pleaded in light of the fact that crucial information concerning the facts of the government's investigation and the government's use of the intercepted conversations is in the exclusive possession of the defendants. *See* Tr. at 42-43. In addition, the Court has considered whether Joanne and Arthur Kinoy have standing. *See* Tr. at 42. While it might be appropriate to dismiss Joanne Kinoy, if none of her conversations were intercepted, it is clear to the Court that Arthur Kinoy can maintain this action on his own behalf and on behalf of clients whose conversations were over-

heard. *See Wounded Knee Legal Defense/Offense Committee* v. *F.B.I.*, 507 F.2d 1281, 1284 (8th Cir., 1974). The Court has also noted the potentially limited nature of Mr. Kinoy's damages, *see* Tr. at 13, 20-22, 31, 34-35, but finds that this alleged deficiency is not fatal to plaintiffs' action. *See Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). Finally, the Court has considered the applicability of *Weinberg* v. *Mitchell, supra*, 588 F.2d 275, to the facts of this case and has found the case neither instructive nor controlling on the immunity issue. Thus, the Court did not overlook any of the above points or decisions and they are not proper grounds for a motion for reargument.

Motion for Certification

In the alternative to their motion for reargument, defendants seek to have the issues raised in the Court's February 4, 1987 order certified for appellate review pursuant to 28 U.S.C. § 1292(b). Title 28 U.S.C. § 1292(b) provides in pertinent part:

> When a district judge, in making in a civil action, an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

The Court of Appeals then has discretion to entertain or decline to entertain this appeal.

The questions to be decided by a district judge when considering a motion for certification are (1) whether the order to be appealed involves a controlling question of law; (2) whether there is a substantial ground for difference of opinion with respect to the resolution of the issue to be appealed, and (3) whether an immediate appeal from the district court's decision could materially advance the ultimate termination of the litigation. *Max Daetwyler Corp.* v. *Meyer*, 575 F. Supp. 280, 282. (E.D. Pa. 1983). When evaluating these factors, a court must remember that certification is to be used sparingly. Section

1292(b) should be used "only in exceptional cases where "an immediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." *Wm. Passalacqua Builders, Inc.* v. *Resnick Developers South, Inc.*, 611 F. Supp. 281, 284 (S.D.N.Y. 1985). A motion for certification should not be granted merely because a party disagrees with the ruling of the district court. *Max Daetwyler Corp.* v. *Meyer*, *supra*, 575 F. Supp. at 282.

The order sought to be appealed in the present case involves a controlling question of law, namely whether it was clearly established at the time of the wiretaps in this case that warrantless domestic security wiretaps of an attorney and his clients could violate the Fifth or Sixth Amendments. A question is "controlling" if error in its resolution would warrant reversal of a final judgment or dismissal, *id.* at 282, and if it is likely to have precedential value. *Abortion Rights Mobilization Inc.* v. *Regan*, 552 F. Supp. 364, 366 (S.D.N.Y. 1982). If this Court erred in its determination that clearly established law prohibited the wiretapping of conversations between an attorney and his clients, defendants would be covered by qualified immunity and the plaintiff's action would have to be dismissed. Since the specific application of *Mitchell* v. *Forsyth*, *supra*, 472 U.S. 511, to Fifth and Sixth Amendment claims is one of first impression, this case is likely to have significant precedential value in this Circuit and others. Thus, the first element of § 1292(b) is satisfied.

The second element of the certification analysis is whether there is a substantial ground for difference of opinion on the issue to be appealed.* The question of whether it was clearly

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* Defendants assert that the controlling question of law on which there was a substantial ground for difference of opinion was the Court's refusal to dismiss pursuant to Rule 41(b), Fed. R. Civ. P., on the basis of failure to prosecute. While the Court recognizes that this might be a controlling question of law, it does not find that this issue raises a substantial ground for difference of opinion. Dismissal for failure to prosecute is a matter committed to the discretion of the district court which is reviewed on an

established at the time of the Kinoy wiretaps that warrantless domestic security wiretaps of an attorney and his clients could violate the Fifth and Sixth Amendments is one not fully discussed by previous cases. Defendants argue that *Mitchell* v. *Forsyth*, *supra*, 472 U.S. 511, and *Weinberg* v. *Mitchell*, *supra*, 588 F.2d 275, are dispositive. Plaintiffs argue that *United States* v. *Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952), illustrates that the law against interceptions of attorney-client communications was clearly established prior to the *Kinoy* wiretaps. While this Court in denying summary judgment has found plaintiffs' analysis to be more persuasive than defendants' argument, this Court recognizes that the defendants' position is not insubstantial. *See Max Daetwlyer Corp.* v. *Meyer*, *supra*, 575 F. Supp. at 283. Therefore, this Court finds there is a ground for difference of opinion sufficient to warrant certification of the question for appeal.

The third and final element of the certification analysis is whether an immediate appeal from an order could materially advance the termination of the litigation. In examining whether immediate appeal may materially advance the ultimate termination of the litigation, a district court should assess the probability that its decision is in error as well as the extent to which additional time and expense may be saved by an interlocutory appeal. *Baxter Travenol Laboratories, Inc.* v. *LeMay*, 514 F. Supp. 1156, 1159 (S.D. Ohio 1981). With regard to this factor, the Court feels that the facts of this action strongly support certification. The controlling question of law in this case is presently before the Second Circuit by virtue of the holding in *Mitchell* v. *Forsyth*, *supra*, 472 U.S. at 530, which permits an immediate appeal in cases where a district court denies a claim

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abuse of discretion standard. *Romandette* v. *Weetabix Company, Inc.*, 807 F.2d 309, 312 (2d Cir. 1986). Dismissal is "a harsh remedy to be utilized only in extreme situations." *Id.* Although there have been lengthy delays in the prosecution of this litigation, this Court found that dismissal was inappropriate in light of the fact that the Court had not ruled on whether certain documents were privileged, Tr. at 8, and because the Court did not give notice to the plaintiffs that further delays would result in dismissal. Tr. at 12. *See Harding* v. *Federal Reserve Bank of New York*, 707 F.2d 46, 50 (2d Cir. 1983).

for qualified immunity. Because defendants have made other arguments which, if decided in defendants' favor, would require dismissal of the case, this Court feels certification of its denial of summary judgment could materially advance the termination of the litigation. Since the Second Circuit will already be considering the immunity question in this case, its consideration of the remaining issues arising under the summary judgment motion would promote judicial economy and avoid piecemeal appeals. Moreover, if this Court declined to certify the order and the Second Circuit upheld this Court's order denying qualified immunity with respect to the Fifth and Sixth Amendment claims, the case would be remanded for further discovery and a lengthy trial. This protracted litigation would be extremely costly and burdensome for the Court and all parties if, upon appeal, the Second Circuit were to find that summary judgment should have been granted for the defendants.

Accordingly, for the foregoing reasons, the defendants' motion for reargument is denied and the defendant's motion for certification is granted. In light of this decision, the Court also grants defendants' motion to stay discovery pending the outcome of the appeal in the Second Circuit.

It is so ordered.

Dated: New York, New York
March 26, 1987

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U.S.D.J.

Supreme Court, U.S.
FILED
FEB 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-892

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR KINOY, PETITIONER

v.

CLYDE A. TOLSON, AS EXECUTOR OF THE ESTATE OF J. EDGAR HOOVER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, an attorney who was incidentally overheard during the course of warrantless national security surveillance directed at others between 1949 and 1970, has a cause of action for damages to redress these alleged violations of his Fifth Amendment rights.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 851 F.2d 591. The opinion of the district court denying rehearing and granting leave to pursue an interlocutory appeal under 28 U.S.C. 1292(b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1988. On September 22, 1988, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including November 28, 1988. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Nearly two decades ago, in 1970, petitioner Kinoy, a civil rights attorney, brought this action against the United States and several former federal officials in their individual capacities, alleging that he had been the subject of unlawful electronic surveillance between 1949 and 1970 (Pet. App. A3-A4). Petitioner sought damages and declaratory and injunctive relief.

The government admitted that petitioner had been overheard during the course of surveillance, directed at others, that had been conducted without a judicial warrant for purposes of national security (Pet. App. A3-A4). In discovery, it produced telephone logs of the intercepted conversations in which petitioner participated (*id.* at A4). See C.A. App. A227-A372. The district court later found that petitioner was not the target of electronic surveillance (Pet. App. A4 n.2), but that he had been overheard on 23 occasions in connection with national security intelligence investigations of other persons (C.A. App. A96).

For six years, from 1979 to 1985, the case lay completely dormant. Then, in *Mitchell* v. *Forsyth,* 472 U.S. 511 (1985), this Court held that federal officials were entitled to qualified immunity from claims for damages under the Fourth Amendment allegedly arising from warrantless domestic security wiretaps prior to 1972, because the applicability of the Fourth Amendment's warrant requirement to such surveillance had not been clearly established until this Court's decision in *United States* v. *United States District Court,* 407 U.S. 297 (1972). Thereafter, the district court asked whether petitioner wished to pursue his action in view of *Forsyth* (Pet. App. A4).

When petitioner indicated that he did, respondents moved, *inter alia,* for summary judgment. Apparently recognizing that *Forsyth* barred his Fourth Amendment

claims, petitioner sought leave to amend his complaint to allege new statutory causes of action (C.A. App. A123). At oral argument on these motions, he withdrew his request for leave to amend when the district court suggested that the new complaint might be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure (Pet. App. A5). Petitioner then advanced the contention that respondents might have used the intercepts against his clients in some manner giving rise to a claim under the Fifth and Sixth Amendments (*id.* at A4-A5). Although he presented no evidence to the district court in support of this new theory, the court denied respondents' motion for summary judgment "without prejudice to renewal" as to petitioner's Fifth and Sixth Amendment claims (C.A. App. A58). See Pet. App. A5, A10.[1] The court permitted petitioner to take further discovery with respect to those claims (C.A. App. A61).

Respondents moved for reconsideration and, in the alternative, for leave to take an interlocutory appeal under 28 U.S.C. 1292(b). The district court denied the motion for reconsideration, but granted leave to appeal (Pet. App. A10-A15). Respondents noticed an appeal as of right from the court's refusal to uphold their defense of qualified immunity and obtained leave from the court of appeals for an interlocutory appeal with respect to other issues (C.A. App. A394).[2]

[1] The court refused to uphold respondents' defense of qualified immunity as to those newly asserted claims because petitioner had suggested "a distinction • • • which takes them out of Forsyth" (C.A. App. A55). The court indicated, however, that it did not at that point agree or disagree with that distinction (*ibid.*).

[2] After these appeals had been taken, petitioner entered a stipulation with the government under which, *inter alia*, (1) the government represented that petitioner was not then the subject of any surveillance, (2) the government promised, without conceding that any prior surveillance had been unlawful, not to undertake any electronic sur-

2. The court of appeals reversed (Pet. App. A1-A9). Without reaching the question whether respondents were entitled to qualified immunity from petitioner's Fifth and Sixth Amendment claims, the court concluded that petitioner had not stated a claim for damages under those provisions (Pet. App. A6, A9). The court noted that petitioner was not seeking to vindicate his clients' rights under the Constitution (*id.* at A6), and held that petitioner, "as an attorney, possessed no constitutional right, independent of his clients' rights, to communicate with the clients without government intrusion when national security interests were at stake" (*id.* at A9). The court noted that the Sixth Amendment's guarantee of the assistance of counsel, on its face, secures no right personal to the attorney (*id.* at A7). In the Sixth Amendment cases relied on by petitioner, the court continued, "either a criminal defendant was asserting a right to communicate confidentially with his attorney, or a court was concerned that interception of attorney-client conversations had deprived a convicted defendant of a fair trial" (*id.* at A7-A8). The court of appeals also distinguished cases in which a doctor or attorney had been granted standing to seek declaratory and injunctive relief to vindicate the rights of a patient or client, explaining that petitioner was seeking only damages (*id.* at A8-A9). The court remanded the case with a direction to dismiss the complaint (*id.* at A9).

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veillance of petitioner or co-plaintiff Joanne Kinoy, petitioner's daughter, except pursuant to lawful authority, (3) petitioner's claims against the United States were dismissed with prejudice, (4) petitioner's claims for declaratory and injunctive relief against all defendants were dismissed with prejudice, and (5) all of Joanne Kinoy's claims were dismissed with prejudice. C.A. App. A395-A398. Thus, in the court of appeals, only petitioner's entitlement to damages from the individual defendants was in issue.

ARGUMENT

The court of appeals correctly concluded that petitioner has no right to recover damages allegedly attributable to respondents' violations of his or his clients' constitutional rights. There is no conflict between the court of appeals' decision and the decisions of any other court of appeals or of this Court, and petitioner's arguments mistakenly equate the showing necessary to establish standing with the elements of a claim for damages. In any event, petitioner's claims under the Fifth and Sixth Amendments—which were first articulated some 17 years after this action was filed in an attempt to avoid dismissal of the action on the authority of *Mitchell* v. *Forsyth*—are not sufficiently concrete to warrant this Court's review.

1. Petitioner seeks review of the question whether he has a Fifth Amendment right to damages for alleged violations of the Sixth Amendment rights of his clients (see Pet. i). However, as the court of appeals explained, the Sixth Amendment provides a right to the client—specifically, the right of "the accused" in "all criminal prosecutions" to "have the assistance of counsel for his defense." U.S. Const. Amend. VI. It does not, by its terms, confer a right on the lawyer to recover damages corresponding to interference with assistance provided to the client, and no case cited by petitioner suggests otherwise.

The Fifth Amendment is not a bootstrap by which petitioner can recover damages corresponding to alleged violations of his client's Sixth Amendment rights. And except for advancing this untenable theory, petitioner has not specified the legal or factual basis for any claim for damages that he might have under the Fifth Amendment. Indeed, the amended complaint, filed in 1971 (C.A. App. A72-A85), contains no hint of this theory, or of any factual basis for it, anywhere in its five causes of action. The

court of appeals was not obligated to divine and recognize petitioner's wholly unarticulated Fifth Amendment claim.[3]

2. With respect to the merits of petitioner's claim for damages, there is no conflict between the court of appeals' decision and the Eighth Circuit's decision in *Wounded Knee Legal Defense/Offense Committee* v. *FBI*, 507 F.2d 1281 (8th Cir. 1974). See Pet. 9. In that case, a group of lawyers had been formed to provide legal aid to criminal defendants in cases growing out of the incident at Wounded Knee; the lawyers alleged that FBI agents were interfering with their attempts to represent their clients, and sought a preliminary injunction prohibiting any further harassment. 507 F.2d at 1283. The district court denied a preliminary injunction, and the lawyers appealed. The court of appeals affirmed the denial of the preliminary in-

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[3] Moreover, even were such a theory tenable and were there facts shown or alleged that might support it, it is evident that in the circumstances of this case no "clearly established" constitutional right of an attorney under the Fifth Amendment was violated in the period (1949-1970) when the events in suit occurred. *United States* v. *United States District Court*, which for the first time applied the Fourth Amendment's warrant requirement to domestic security wiretaps, was not decided until 1972, and the only lower court decision prior to that time that lends any support to petitioner's constitutional theory is *Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir. 1951), a decision by a divided court reversing a *criminal* conviction on the basis of an intentional wiretap of pretrial communications between the criminal defendant and her attorney. This Court did not clarify the elements of a criminal defendant's right of action under the Sixth Amendment for allegedly unlawful government surveillance until *Weatherford* v. *Bursey*, 429 U.S. 545 (1976). That decision, however, did not address the right of a defendant's attorney, if any, to obtain relief in that situation. Thus, respondents' claim of qualified immunity is a strong one. (Indeed, the plaintiff in *Mitchell*, who was a defendant in a criminal case, had specifically alleged a Sixth Amendment claim in his complaint. See Joint Appendix at 19, 21, *Mitchell* v. *Forsyth*, *supra*).

junction, but found that a lawyer had *standing* to "challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel." *Id.* at 1284. The Eighth Circuit's ruling was carefully limited. It determined only that the claim was "justiciable," noting that the "merits of the case," including the existence of the lawyers' alleged right "to provide effective assistance of counsel to their Indian clients," were "not yet determined" (*ibid.*).[4] An appeal from the denial of a preliminary injunction provided no occasion, of course, to consider whether an attorney could recover damages based upon an alleged violation of a client's Sixth Amendment rights. In *Wounded Knee,* therefore, the Eighth Circuit did not and could not have reached the issue resolved by the court of appeals in this case.

More broadly, petitioner confuses the showing necessary to establish standing with the requirements of a claim for damages. See Pet. i-ii, 10-15. The question whether a plaintiff has alleged "injury in fact" and an "interest * * * arguably within the zone of interests to be protected or regulated by the * * * constitutional guarantee in question" is quite distinct from whether he can demonstrate a violation of a legal right that is compensable in damages. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp,* 397 U.S. 150, 152-153 (1970). As *Camp* makes clear, a showing of an entitlement to relief on the merits is not necessary to establish standing. By the same token, a showing of standing does not foreclose a decision that a plaintiff has failed to state a claim, the

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[4] Similarly, the portion of *Nyberg* v. *City of Virginia,* 495 F.2d 1342 (8th Cir. 1974), on which petitioner relies addressed only the standing of physicians to challenge the constitutionality of a hospital resolution prohibiting the use of hospital facilities for abortions. Pet. 12-13.

ground on which the court of appeals dismissed petitioner's claim for damages.[5]

Petitioner's reliance on cases addressing the doctrine of *jus tertii*—standing to argue the rights of third parties in challenging the constitutionality of a statute or official action—is completely off the mark. See Pet. 15-20. In *Singleton* v. *Wulff, supra,* four Members of the Court joined in the conclusion that doctors challenging a statute restricting the use of Medicaid funds for abortions could invoke the rights of their patients in arguing that the statute was invalid. Even these Members of the Court recognized, however, that "[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." 428 U.S. at 114 (quoting *Barrows* v. *Jackson,* 346 U.S. 249, 255 (1953)). Nothing in this case, or others permitting professionals to assert the rights of patients or clients in challenging the constitutionality of statutes or other official actions, suggests that a party may recover damages corresponding to a denial of another person's rights. See Pet. 20-23. Actions seeking damages for alleged deprivations of constitutional rights are governed by the principle "that a person should be compensated fairly for injuries caused by the violation of *his* legal rights." *Carey* v. *Piphus,* 435 U.S. 247, 257 (1978)

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[5] The cases on which petitioner relies illustrate the point. For instance, in *Singleton* v. *Wulff,* 428 U.S. 106, 112-113 (1976), the Court found that physicians had standing to challenge a state law prohibiting Medicaid reimbursement for abortions that were not "medically indicated," because if the doctors prevailed in their challenge they would obtain payment for such abortions. A finding that this interest presented a "case or controversy," however, did not remotely suggest that the doctors had a legal right to recover damages from the officials named as defendants.

(emphasis added). See *Memphis Community School Dist.* v. *Stachura,* 477 U.S. 299 (1986).[6]

3. This case does not provide an appropriate occasion, in any event, in which to consider what rights an attorney may have as such to be free from surveillance affecting his clients' Sixth Amendment rights. As noted above (p. 5, *supra*), petitioner's amended complaint, which was filed in 1971, provides absolutely no particulars regarding any such claim. Rather, after alleging that petitioner and his daughter had been the subject of warrantless electronic surveillance, the complaint states only that (C.A. App. A77):

> Such electronic surveillance further violates the rights of plaintiffs to effective assistance of counsel, to due process, to fair trial, to be free from unreasonable searches and seizures and the right of privacy in violation of the Fourth, Fifth, Sixth and Ninth Amendments to the Constitution of the United States, 18 U.S.C. §§ 2510-20, 47 U.S.C. § 605 and the attorney-client privilege.[7]

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[6] *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), does not support a claim for damages in this case. See Pet. 10. That case involved a criminal prosecution for teaching German, and raised no claim comparable to any that petitioner may conceivably assert in this case. The Court has since declined to rest on the "broad premise" of *Meyer*, on which petitioner relies here, that the Due Process Clause guarantees the liberty to "engage in any of the common occupations of life" (*Meyer* v. *Nebraska,* 262 U.S. at 399). See *Epperson* v. *Arkansas,* 393 U.S. 97, 105-106 (1968). The result in *Meyer* is now usually explained as reflecting the interest of the parents in that case in directing the education of their children. See, *e.g.*, *Moore* v. *East Cleveland,* 431 U.S. 494, 499, 501 (1977).

[7] The uncertainty in the nature of these claims is compounded by the fact that petitioner's daughter, Joanne Kinoy, joined as a plaintiff in the suit in her capacity as petitioner's client and a representative of other clients. Thus, it is impossible to discern from the face of the complaint whether the allegations of violations of rights under the

Under *Weatherford* v. *Bursey*, 429 U.S. 545 (1976), even a criminal defendant who seeks damages for surveillance allegedly violating his Sixth Amendment rights must demonstrate that the government has misused the fruits of that surveillance in his prosecution. In this case, although the government years ago produced logs of the intercepts in which petitioner was overheard, he has not yet identified any instance in which his representation of any client was affected by these intercepts. As the court of appeals found, petitioner did not even contend that the intercepts had been used against his clients until the hearing on the government's summary judgment motion in 1987. Pet. App. A5.

Thus, this case presents only the naked allegation, unsupported by specifics some 18 years after the suit was filed, that conversations intercepted in the course of national security surveillance of persons other than petitioner were later misused.[8] Ordinarily, this Court is reluctant to decide constitutional questions outside of a concrete factual setting. *E.g.*, *Socialist Labor Party* v. *Gilli-*

Fifth and Sixth Amendments refer to petitioner, as opposed to Joanne Kinoy. All of Joanne Kinoy's claims have been dismissed with prejudice pursuant to stipulation with the government. C.A. App. A397.

[8] Petitioner's contention that the government has improperly withheld discovery is groundless. In this case, the government produced thousands of documents, including wiretap logs itemizing each occasion on which petitioner was overheard (C.A. App. A227-A342), and provided petitioner with the names of persons having knowledge of the surveillance. The court upheld the government's claims of privilege, which were supported by affidavits of four Attorneys General. See C.A. App. A18, A48-A49. A plaintiff may not, by asserting vague claims and the need for discovery, play "dog in the manger" in response to a motion for summary judgment challenging the sufficiency of a *Bivens* claim. See *Butz* v. *Economou*, 438 U.S. 478, 509-510 (1978).

gan, 406 U.S. 583, 588 (1972); *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 569 (1947); *Ashwander* v. *TVA,* 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). Even apart from the merits, therefore, the abstract nature of petitioner's claim makes this case inappropriate for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1989

:: U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00095